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## *Case Summary posted by the Task Force on Access to Justice*

### European Union: C-167/17 *Klohn v An Bord Pleanála*

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| *1. Key issues* | Does the "not prohibitively expensive" requirement in Art 11 of Directive 2011/92/EU have direct effect and what is the temporal application of that rule? |
| *2. Country/Region* | European Union |
| *3. Court/body* | Court of Justice of the European Union, First Chamber |
| *4. Date of judgment /decision* | 2018-10-17 |
| *5. Internal reference* | C-167/17<br>ECLI:EU:C:2018:833 |
| *6. Articles of the Aarhus Convention* | Art. 9, para. 4 |
| *7. Key words* | Reference for a preliminary ruling, EIA directive, access to justice, right to challenge a development consent decision, requirement for a review procedure which is "not prohibitively expensive", temporal application of obligation on national court to give effect to the "not prohibitively expensive rule", direct effect, consistent interpretation, effect of national decision on the taxation of costs which has become final, res judicata |

*8. Case summary*

It is important to note at the outset that the deadline for Member States to transpose Art 10a (now Art 11) of the EIA directive into national law was 25 June 2005. In Case C-427/07 *Commission v Ireland* EU:C:2009:457 the CJEU ruled that Ireland had failed to transpose Article 10a of the EIA Directive into national law. It was 2010 before Ireland introduced legislation to give effect to Art 10a. However, those legislative provisions are not applicable *ratione temporis* to the main proceedings in this case.

Mr Klohn sought to challenge a development consent granted by An Bord Pleanála (the Planning Appeals Board, Ireland) in 2004. He applied to the High Court of Ireland for leave (permission) to bring judicial review proceedings on 24 June 2004. Leave was granted on 31 July 2007. The High Court dismissed the application for judicial review on 23 April 2008 and, subsequently, on 6 May 2008 it ordered Mr Klohn to pay the costs incurred by An Bord Pleanála. Mr Klohn did not appeal that decision.

The Taxing Master of the High Court quantifies the amount of costs to be reimbursed. Mr Klohn argued before the Taxing Master that under art. 3, para. 8, and art. 9, para. 4, of the Aarhus Convention and Art 10a of the EIA Directive the costs awarded against him should not be "prohibitively expensive".

The Taxing Master considered that he did not have power under national law to examine whether costs were "prohibitively expensive" and he proceeded to assess the costs payable by Mr Klohn at €86,000 approx. The High Court upheld the Taxing Master's decision and Mr Klohn then appealed to the Supreme Court, which referred three questions to the CJEU which may be summarised as follows:

> (1) Can the "not prohibitively expensive" provisions of Article 10a of [Directive 85/337 as amended] potentially have any application in a case such as the instant case where the development consent challenged in the proceedings was granted prior to the latest date for transposition of that directive and

where the proceedings challenging the relevant development consent were also commenced prior to that date? If so have the "not prohibitively expensive" provisions of [Directive 85/337 as amended] potential application to all costs incurred in the proceedings or only to costs incurred after the latest date for transposition?

(2) Is a national court which enjoys a discretion concerning the award of costs against an unsuccessful party, in the absence of any specific measure having been adopted by the Member State in question for the purposes of transposing Article 10a, obliged, when considering an order for costs in proceedings to which that provision applies, to ensure that any order made does not render the proceedings "prohibitively expensive"?

(3) Where an order for costs is unqualified and would, by virtue of the absence of any appeal, be regarded as final and conclusive as a matter of national law, does Union law require that either the Taxing Master or a court nonetheless have an obligation to depart from otherwise applicable measures of national law and determine the amount of costs to be awarded in such a way as ensures that the costs so awarded do not render the proceedings prohibitively expensive?

The CJEU dealt with the second question first. The fifth paragraph of Art 10a of the EIA directive simply provides that the review procedure "shall be fair, equitable, timely and not prohibitively expensive". The general nature of the words used here led the Court to conclude that it was "difficult to envisage how those provisions may be regarded as imposing sufficiently precise obligations on the Member States in order to dispense with national implementing measures". It recalled that by virtue of national procedural autonomy the Member States have a measure of discretion when implementing Art 10a (subject, as ever, to the principles of equivalence and effectiveness). The CJEU also recalled its earlier judgment in Case C-470/16 *North East Pylon Pressure Campaign* EU:C:2018:185 (a reference from the High Court of Ireland) where it held that art. 9, para. 4, of the Aarhus Convention (on which Art 10a of the EIA directive is based) was not directly applicable. It followed from this analysis that the "not prohibitively expensive rule" in Art 10a does not have direct effect.

However, once the time limit for transposition of Art 10a has expired (25 June 2005), the national courts are required to interpret national law, to the fullest extent possible, with a view to achieving the objective sought by that provision.

Turning to the first question and the temporal application of the "not prohibitively expensive rule" in circumstances where no national implementing measures had been adopted by Ireland by the 25 June 2005 deadline, the CJEU determined that:

> [N]ational courts are required to interpret national law, as soon as the time limit for transposing an untransposed directive expires, so as to render the future effects of situations which arose under the old rule immediately compatible with the provisions of that directive.

It followed that when deciding on the allocation of costs in proceedings which were ongoing as at the date on which the deadline for transposition of Art 10a expired, the national court must interpret national law "in order to achieve so far as possible an outcome consistent with the objective pursued by the not prohibitively expensive rule".

It was not necessary therefore to distinguish between costs depending on whether they had been incurred before or after the deadline for transposition (25 June 2005), provided that the decision as to the allocation of costs liability had not been taken as at that date.

The CJEU was not impressed by the argument mounted by An Bord Pleanála that the principle of legal certainty and the principle of the protection of legitimate expectations would be infringed by applying the "not prohibitively expensive rule" to ongoing legal proceedings.

It concluded that national courts are under an obligation to interpret national law in conformity with Art 10a when deciding on the allocation of costs in judicial proceedings which were ongoing as at the date on which the time limit for transposing the "not prohibitively expensive rule" expired, irrespective of the date on which those costs were incurred during the proceedings.

The CJEU began its consideration of the third question by noting that, in Ireland, the costs procedure takes place in two stages: following its decision on the substance of the case, the court makes an order as to *how* costs are to be borne. Subsequently, the Taxing Master determines *the amount of the costs*, subject to review by a court (the High Court, with an appeal to the Supreme Court).

The question to be determined here was whether, having regard to the force of *res judicata* attaching to the High Court's decision of 6 May 2008 that Mr Klohn should pay An Bord Pleanála's costs (which became final when it was not appealed), a national court called on subsequently to rule on Mr Klohn's application challenging the Taxing Master's decision determining the actual amount of costs payable is required to interpret national law so that he does not have to bear prohibitively expensive costs.

The CJEU determined that it was for the referring court to assess the force of *res judicata* attaching to the High Court's decision of 6 May 2008 so as to determine if, and to what extent, national law may be interpreted in conformity with the "not prohibitively expensive rule".

It went on to clarify, however, that the purpose of the High Court's decision of 6 May 2008 ordering Mr Klohn to pay An Bord Pleanála's costs, is not the same as the Taxing Master's subsequent decision which fixed the precise amount of costs to be paid by Mr Klohn. The CJEU emphasised that the force of *res judicata* only attached to the legal claims on which the court has ruled. Accordingly, it does not preclude the Taxing Master or a court, in a subsequent dispute, from ruling on points of law on which there is no ruling in that definitive decision.

The CJEU went on to confirm that an interpretation according to which An Bord Pleanála would be entitled to claim all the costs it reasonably incurred in defending the judicial review proceedings "would be contrary to the principle of legal certainty and the requirement for the foreseeability of EU law". Recalling the Advocate General's Opinion in this case, the Court pointed out that, prior to the Taxing Master's decision, Mr Klohn could not have been aware of the amount of costs for which he would be liable and was not, therefore in a position to challenge the High Court's decision of 6 May 2008 with full knowledge of the facts. The amount of costs recoverable as determined by the Taxing Master was "all the more unforeseeable" for Mr Klohn because "it was around three times the amount of the costs which he himself had incurred in the proceedings."

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| *9. Link address* | http://curia.europa.eu/juris/liste.jsf?language=en&td=ALL&num=C-167/17<br><br>http://www.unece.org/fileadmin/DAM/env/pp/a.to.j/Jurisprudence_prj/EUROPEAN_UNION/CJEU_C167_17_Klohn/CJEU_C167_17_Klohn_Judgment.pdf |